

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE OWNERSHIP OF)	
RENEWABLE ENERGY CERTIFICATES (“RECS”))	Docket Nos:
UNDER THE ELECTRIC DISCOUNT AND)	EO04040288
ENERGY COMPETITION ACT, AS IT PERTAINS)	and
TO NON-UTILITY GENERATORS AND THE)	EX04080879
BOARD’S RENEWABLE ENERGY PORTFOLIO)	
STANDARDS)	

**COMMENTS OF
The Pollution Control Financing Authority of Camden County**

The Pollution Control Financing Authority of Camden County (PCFACC) appreciates the opportunity to provide the Board of Public Utilities (BPU) with comments in the above-captioned proceeding to determine the treatment of renewable energy certificate (REC) ownership for NUGs in long term Power Purchase Agreements (PPAs).

PCFACC respectfully urges the BPU to conclude that BGS suppliers should be required to purchase RECs from the marketplace in order to meet their renewable portfolio standards (RPS) obligation. This result not only comports with recent FERC decisions, but also provides significant benefits to Camden County taxpayers and all New Jersey taxpayers, as described herein. It has the further benefit of assisting in the development of the renewable power industry.

The PCFACC is a government agency that is responsible for the disposal of solid waste in Camden County, New Jersey. The PCFACC operates the Pennsauken Sanitary Landfill and oversees operation of the Camden Resource Recovery Facility (CRRF). The Camden Resource Recovery Facility uses mass burn technology to convert over 300,000 tons per year of solid waste into enough electricity to supply the needs of approximately 25,000 homes. PCFACC sells the power it generates to JCP&L through a long-term power purchase agreement. This agreement does not specify that renewable attributes are being sold to the utility.

PCFACC respectfully urges the Board to alter its policy of allowing New Jersey's Electric Distribution Companies (EDCs) to provide renewable attributes to winning BGS bidders at no cost. This policy has proved to be advantageous to BGS suppliers, because it reduces their costs in complying with New Jersey's renewable portfolio standards (RPS). It is not clear whether such cost reductions reflected in lower BGS prices are retained by BGS suppliers. PCFACC believes that recent federal action, as well as the potential benefits to the State from allowing generators to sell their renewable attributes into the market, justifies a change to the BPU's policy so that BGS suppliers purchase RECs in the market in the same manner as all other suppliers.

Programs, like the RPS, have created a new product, RECs, which establish economic value for renewable attributes separate from the energy and capacity traditionally sold through power purchase agreements (PPAs).

On October 1, 2003, the Federal Energy Regulatory Commission (“FERC”) issued an order concluding that power purchase agreements entered into pursuant to PURPA do not transfer renewable attributes to the purchasing utility in the absence of an express contractual provision within the underlying power purchase agreement. As stated above, PCFACC has a long-term PPA with JCP&L, and that PURPA contract does not include any provisions transferring the ownership of renewable attributes to the EDC.

In light of FERC’s action in this regard and the State’s RPS program, PCFACC is requesting confirmation from the BPU that EDCs will no longer be permitted to provide renewable attributes (or their equivalent value), which they have no contractual right to, to BGS winners and that PCFACC may sell its RECs on an unbundled basis in the REC marketplace. PCFACC and other renewable producers would be able to meet the needs of BGS and other suppliers through open market transactions. Until such a time as PJM establishes its generation attributes tracking system, suppliers should be permitted to self certify the megawatt hours of RECs that they create and sell.

This finding would provide the PCFACC and other owners of renewable credits with the certainty they require to sell their attributes. It will help to create a truly competitive market for RECs, and thereby promote renewable project development.

As a government entity, PCFACC has a strong interest in reducing the burden on New Jersey’s taxpayers. PCFACC relies on substantial financial support from the State of New Jersey to support its viability which has been

threatened as the result of financial and waste flow difficulties occurring as the result of various federal court decisions. The potential revenue from the sale of RECs from the Camden facility would reduce the level of state support that is needed and would ultimately result in substantial savings for the residents and taxpayers of New Jersey and Camden County. Therefore, additional revenues from the sale of renewable certificates will flow to the benefit of the state and its taxpayers. By allowing BGS winning bidders to take away the economic value of RECs that legally belongs to the PCFACC, the BPU is harming the taxpayers of New Jersey.

In conclusion, it would be in the best interest of the State to require BGS suppliers to purchase renewable attributes in the marketplace. This action will move New Jersey in the direction of creating a REC market that is more effective in helping the development of the renewable energy market. Moreover, the ability of Camden County to sell its renewable attributes will not only benefit Camden County taxpayers but also taxpayers statewide that are supporting the operation of the Camden facility.

PCFACC is pleased to provide answers to questions asked by the BPU in its Order of August 18, 2004.

- 1) **Does the State have jurisdiction to decide the issue of the ownership of RECs? In your discussion, please consider the recent decisions in American Ref-Fuel Company, et al. (105 FERC 61,004, October 1, 2003) and (107 FERC 61,016, April 15, 2004) denying motions for rehearing**

and reaffirming earlier decision) and discuss any relevant preemption or other jurisdictional issues.

The FERC decision of October 1, 2003 establishes ownership of RECs associated with the sale of energy and capacity by NUGs involved in long term PPAs. This ruling specifically states that “contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary)”. When these long term contracts were established, the commodity of RECs was nonexistent. RECs are a new product that must, as a matter of law, be contracted for and sold pursuant to their own terms separately from the energy and capacity terms in the PPA. Just as the PCFACC sells metals that it pulls from the waste stream into the market for recyclables, so is it entitled, as a matter of law, to sell its RECs into the market for RECs. PCFACC believes that such a right should be assured by the BPU as a matter of law and policy. The BPU should recognize that PCFACC has a legal right to sell its RECs, especially since such sales would support New Jersey’s renewable industry and, for PCFACC, will reduce taxes for New Jersey.

The FERC decision supports this conclusion by stating that RECs belong to the generators and that only the energy and capacity are transferred to the utilities, as is specifically provided for in the PPA.

The FERC Declaratory Order also notes that, “[w]hile a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.”

FERC Oct. 1 Order at 1. The state law at the center of such a determination in New Jersey is the Electric Discount and Energy Competition Act. The BPU's jurisdiction in the area of RECs is defined by the RPS provisions of the Electric Discount and Energy Competition Act (EDECA) which gives the BPU the authority to establish and maintain the RPS program. The BPU's BGS jurisdiction is also defined by EDECA.

While EDECA provides the BPU with authority to determine the manner in which BGS will be provided, it also establishes that:

Nothing in this act shall be construed to alter non-utility generator power purchase contracts in existence on the effective date of this act or the board's orders approving said contracts.

N.J.S.A. 48:3-61(k).

In other words, EDECA specifies that the Board cannot subsequently change the terms of NUG agreements negotiated by non-utility generators and utilities and then approved by the BPU. In addition to the restrictions to state authority proscribed by the FERC decision of October 1, 2003, the BPU is also constrained by EDECA from changing in any way the provisions of NUG PPAs or the BPU orders approving them. As stated previously, the FERC has concluded that contracts for the sale of QF capacity and energy entered into under PURPA were not intended to and do not convey RECs to the purchasing utility, in the absence of a specific provision otherwise.

PCFACC respectfully argues that this FERC Order should be read in conjunction with the EDECA prohibition on altering NUG contracts to mean that the BPU cannot reinterpret NUG contracts to provide for an after-the-fact sale of

RECs that was not contemplated at the time the contracts were negotiated and approved by the Board. Accordingly, the BPU is specifically prohibited by EDECA from limiting activities not provided for in the approved NUG PPA.

FERC also concluded that to the extent there is a preexisting state law which provides for ownership of RECs to rest with the utility in long term NUG power agreements, such a law would prevail. However, New Jersey has no such law. In fact, the above provisions provide for the opposite result: the BPU is precluded from changing the relationship between the utility and the NUG to allow transfer of REC value, simply because there is a pre-existing energy and capacity sale.

Based on the above, the BPU doesn't have the right to confiscate the renewable attributes from their NUG owners. As a result, the BPU can oversee REC market operations, but they can not dictate ownership. The BPU should allow RECs to be traded freely in the market as it currently does for solar RECs (SRECs).

2) Assuming the ownership of state-created RECs is an issue to be determined by the State, is this a regulatory issue to be decided by the Board, pursuant to its Title 48 authority, or is this a contract issue to be decided by the courts?

Assuming, for the sake of argument, that this is a regulatory issue that should be decided by the Board, there is a sound policy basis for creating an open REC market. The Board should align their ruling with the FERC decision, restating that the RECs belong to the generators. This action will prove to be extremely

beneficial to New Jersey for many reasons. It will promote renewable development in New Jersey, which will translate into less pollution and reduced environmental harm. As discussed in more detail elsewhere in our comments, the REC market will expand, allowing for additional revenues to be realized by PCFACC, reducing the financial burden on the State and its taxpayers. From an economic standpoint, this policy would also allow for a more competitive retail electric market since BGS suppliers and competitive retail suppliers will compete for REC purchases. Renewable project initiatives will grow, increasing the use of cleaner, more reliable energy sources.

3) Assuming this is a regulatory issue to be decided by the Board, what factors should the Board consider? May the Board treat contracts entered into prior to the creation of RECs differently than contracts entered into subsequent to the creation of RECs?

At this time, the only utility contracts that have been created since the creation of the REC market are BGS contracts and restructured NUG agreements. The question does not apply to either of these types of agreements since neither of these are facility based agreements.

The factors the Board should consider are property rights of NUGs, promotion of the renewable market, benefits to state and local taxpayers, and the impact on ratepayers. With respect to the last issue, currently BGS suppliers receive RECs at no cost. It is not clear whether these savings are passed on to ratepayers, or whether BGS suppliers have “priced” the market value of RECs into their bids.

However, assuming that the BGS suppliers would have to purchase the RECs at market value that they were previously receiving for free, and that this cost was passed through to ratepayers, the impact on ratepayers is estimated to be approximately 6.5 million per year (see attached spreadsheet). This represents 0.09% of electric utility rates in New Jersey. Surely this small impact does not outweigh the significant reasons for allowing renewable NUG facilities to sell their RECs into the market. Such reasons include the benefits to the state budget and state and local taxpayers if the PCFACC is permitted to sell RECs; the promotion of the renewable power industry; promotion of an even playing field between BGS suppliers and competitive retail suppliers; and elimination of the BPU's current discriminatory policy between renewable facilities without long term PPAs and those that are under long term PPAs.